United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

76-2065

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR RICHARD GATES,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE
ON REHEARING EN BANC

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BRIEF FOR RESPONDENT-APPELLEE
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Preliminary Statement

Petitioner-appellant Gates (hereinafter "petitioner" or "Gates") appeals from an unreported decision of the United States District Court for the Southern District of New York (Carter, J.), dated May 27, 1976, which denied his habeas corpus application without a hearing. The District Court granted him a certificate of probable cause.

On appeal, this Court (Smith, Oakes, CJJ; Timbers, CJ., dissenting) reversed and remanded for an evidentiary hearing. Gates v. Henderson, ___ F. 2d ___ (January 12, 1977) (Slip Opin. 1345). On the petition of respondent-appellee (hereinafter "respondent"), this Court on March 7, 1977 granted rehearing en banc.

Questions Presented

1. Does Stone v. Powell bar the granting of habeas relief to a state applicant who concededly failed to use the state-provided procedure to challenge evidence on Fourth Amendment grounds, regardless of the reason for that failure?

2. Was the admission of petitioner's palmprint harmless error beyond a reasonable doubt when unchallenged fingerprints taken from the same entry point to the murder victim's apartment were also before the jury?

Statement of the Case

Petitioner is presently incarcerated at Auburn Correctional Facility, Auburn, New York, pursuant to a judgment of conviction of the County Court, County of Rockland (Silberman, J.). He was convicted of the crime of murder in the first degree after a trial by jury. On February 14, 1967 Gates was sentenced to life imprisonment.

A. The Crime and Evidence*

On September 7, 1966 at approximately 1:00 A.M. the police were summoned to the apartment of one Patricia Gates by an upstairs neighbor (Mierop) who heard unusual noises and screams. The police discovered Mrs. Gates, bloodied and moaning, in her bed. Before shortly expiring

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* The facts contained in this section are taken from the fact and argument sections of Gates' own briefs in the Appellate Division and the Court of Appeals on his direct appeal. Respondent has filed with the Clerk of this Court the following complete set of briefs:

"A" - Gates' Appellate Division Brief
"B" - District Attorney's Appellate Division Brief
"C" - Gates' Court of Appeals Brief
"D" - District Attorney's Court of Appeals Brief
"E" - Gates' Court of Appeals Reply Brief

into unconsciousness and death, she responded to brief inquiry by her neighbor. When asked if petitioner had done it, she first remained silent. When asked again, she replied that she did not know but that "he wore glasses" (as did Gates).

Patricia Gates was the estranged wife of petitioner. Petitioner visited the children regularly at the apartment. The couple had been separated for about one year and Mrs. Gates had custody of their four children. Their divorce and her permanent custody became final only four days before the homicide. Mrs. Gates was engaged to marry one George Morse who had been at her home the evening of her murder until 11:30.

At 1:45 A.M. a policeman stopped Gates' car for failure to dim his headlights. The policeman had received a wanted person bulletin for Gates about ten minutes earlier. Upon discovering that the driver was Gates, he placed him under arrest.

The State's case was circumstantial. Evidence was introduced that Gates had made threats against his wife and fought with her about custody of the children; that on the night of his arrest he had bleeding cuts on his right hand;

that he smelled of soap, had on no underwear, and wore an uncreased and clean shirt (indicating a recent shower); and that his house was about one-half mile from Patricia Gates' home.

Most devastating were fingerprints and palmprints found on the screen and windowsill leading to the bathroom of the Patricia Gates apartment. The front and back doors were locked but the bathroom screen had been removed and the window was open. The fingerprints were found on the bottom wooden frame of the screen, positioned so that they could have been made only by a person on the outside who placed his hands under the lower portion of the screen as one would in lifting the screen from the window. The palmprints were found on the bathroom windowsill facing inward. One fingerprint and one palmprint were positively identified as petitioner's.* Defendant did not put on any testimony.

B. The Introduction of and Objections to the Admission of the Palmprints and Fingerprints**

No pretrial suppression motion was made by petitioner. On at least three occasions during the trial, Gates objected to the admission of prints. Police officer Eisgrau took Gates' palmprints (handprints) on the morning

* No prints were recovered from the murder weapon.
** This application challenges only the palmprints but we refer to both in this section to set the tone of the trial.

of the arrest, September 7, 1966. During his testimony came Gates' catchall constitutional objection (while in chambers) to "the mere fact of the taking of the prints" as violative of his rights under the state and federal constitutions. (ROA 369)* This objection is printed in full in Gates' brief on rehearing at pp. 7-8.
Petitioner not only failed to give the basis for this constitutional objection but also he did not move at trial to suppress the palmprints (see Code Crim. Proc. § 813-d[1]) nor did he request a hearing (see §813-d[3]). The Court overruled the objection but gave petitioner a similar objection, without the necessity for renewal, to the further introduction of prints taken by law enforcement personnel (ROA 369). Eisgrau was later recalled and questioned as to whether counsel was present during the September 7 palmprinting (ROA 539-540).

On the following day of trial, John Slater, an identification officer of the Rockland County Sheriff's

* ROA references are to the two volume Appellate Division Record on Appeal, a copy of which will be filed with the Clerk of this Court. The ROA pages do not correspond to the actual transcript pages; respondent was unable to obtain the latter.

Office testified to fingerprints he took on the day of arrest. Gates made the same objection as was made out of the jury's presence previously (ROA 410). When Slater testified to his taking of palmprints, Gates raised the same objection (ROA 411). Out of the presence of the jury, Gates continued his objection (beginning at ROA 412). Counsel stated that "no advice of rights" had been given (ROA 413). Counsel then said that he had wanted to "save" this objection until that morning but that yesterday's objection (to the Eisgrau palmprint) was objected to on the same grounds although he'd not gone "into the reason" (ROA 415-416). The Court allowed the objection to be taken as to both sets of palmprints (416-417). Counsel then questioned Slater as to whether rights or warnings were given to Gates and whether force was used to take the prints (ROA 418-419).

As to Slater's taking of Gates' fingerprints on October 21, 1977, counsel again questioned Slater as to whether Gates had been told of his rights or whether counsel had been informed of the procedure (ROA 436-437). When an FBI examiner testified, using the October fingerprints,

petitioner moved to strike his testimony because the October prints had been taken "without any proper warning" to Gates and "after the time counsel had been retained" (ROA 505-506).

We note that when Gates intended a Fourth Amendment objection to evidence, he was quite specific, if not too artful. See ROA 673-681. When counsel objected to testimony by a policeman as to what he observed during a search of Gates' house on September 7 pursuant to a search warrant, he went into much detail. Here, the issues of the taking of further evidence and possible waiver under § 813 arose (ROA 678, 681-683).

C. The Appeal and the Post-Conviction Proceeding

Petitioner's judgment of conviction was affirmed without opinion by the Appellate Division, People v. Gates, 29 A D 2d 843, 288 N.Y.S. 2d 862 (2d Dept. 1968), and unanimously by the Court of Appeals. 24 N Y 2d 666, 301 N.Y.S. 2d 597, 249 N.E. 2d 450 (1969). The Court of Appeals, after careful consideration of the circumstantial evidence, held that it was sufficient to establish Gates' guilt beyond a reasonable doubt. 24 N Y 2d at 667-669.

With regard to Gates' newly pressed claim* that his prints should not have been admitted because they were taken after an illegal arrest (that is, an arrest without probable cause), the Court recognized the vitality of the argument (Davis v. Mississippi, 394 U.S. 721 [1969]) but refused to consider it. Id. at 669-670. The Court held that the claim had not been preserved for review because Gates had not made a pretrial motion to suppress or an objection at trial grounded on the Fourth Amendment. Id. at 670. The Court noted that had Gates done so, the People would have then had an opportunity to show what information they possessed at the time of arrest (for example, the Court said, they may already have learned of his threats against his wife). Id.

Petitioner, represented by his trial counsel, then applied for a writ of error coram nobis, which was denied. People v. Gates, 61 Misc 2d 250, 305 N.Y.S. 2d 583 (Rockland Co. Ct. 1969). Here, Gates again challenged the taking of the prints on the ground that there had been no probable cause for his arrest and hence that he was illegally detained

* Respondent will conclusively demonstrate that Gates' Fourth Amendment claim was not raised nor intended to be raised until his brief in the New York Court of Appeals (post at 16-19).

when the prints were seized. Noting that it was undisputed that this ground had not been asserted by a motion to suppress, by trial objection, or by motion to arrest judgment or for a new trial (61 Misc 2d at 251), the Court held that Gates' failure to avail himself of legitimate state procedural requirements properly subjected him to forfeiture of his claim. Id. at 252-253.*

The order was affirmed by the Appellate Division, 36 A D 2d 761, 319 N.Y.S. 2d 569 (2nd Dept. 1971), and leave to appeal to the Court of Appeals was denied in January, 1972.

D. Federal Habeas Proceeding - The District Court

Petitioner then commenced a habeas corpus proceeding in the District Court. Counsel was appointed by the Court and both parties filed memoranda of law and letters.

Petitioner challenged the admission of the palmprint evidence on the ground that it was taken from him

* The Court also held (id. at 253-255), incorrectly, that Davis v. Mississippi, supra, 394 U.S. 721, was to be given prospective effective only.

during detention following an arrest without probable cause.* Gates argued that his general objection at trial was a Fourth Amendment objection. The State maintained that it was a "catch-all" constitutional objection which could have been intended to raise a Fifth Amendment claim. Respondent argued further that had Gates intended a Fourth Amendment claim, he surely would have made the appropriate motion (not objection) during trial (Code Crim. Proc. § 813-d) and asked for a hearing since additional evidentiary material was obviously called for.

The District Court rendered its decision denying the application on May 27, 1976, prior to the decision of the Supreme Court in Stone v. Powell ("Stone"), ___ U.S. ___, 96 S. Ct. 3037 (1976). The Court found that Gates' procedural default in the trial court, which barred him from state court review, also barred him from federal habeas corpus review. The Court also stated that the state courts had refused to review Gates' claim because his trial objection was not sufficiently specific to raise the Fourth Amendment claim.

* Petitioner challenged only the palmprints taken while he was in allegedly illegal custody, but not the fingerprints. The reason for this is discussed post at 33 .

E. Federal Habeas Proceeding - The Court of Appeals

Petitioner appealed to this Court after the District Court granted a certificate of probable cause. The District Court's order was reversed and the case remanded for an evidentiary hearing on the issue of probable cause for the arrest.

The majority rejected the State's argument that Stone barred petitioner's claim. The Court decided the "cf." footnote to Townsend v. Sain, 372 U.S. 293 (1963) in the Stone opinion was meant to help define "opportunity for full and fair litigation." Slip Opin. 1352-1355. Using Townsend's reference to Fay v. Noia, 372 U.S. 391 (1963), the majority held that Gates did not deliberately bypass the state procedure for raising his Fourth Amendment claim since they could conceive of no strategic reason for him to do so. Slip Opin. 1357-1358.

The Court assumed (incorrectly, as demonstrated post at 16-19) that petitioner's catchall objection to the evidence at trial might have had Fourth Amendment implications and that the state appellate and coram nobis courts may have been unaware of the objection. Slip Opin. 1348, 1355-1357.

While recognizing the obvious lack of specificity in the trial objection, the majority concluded (again referring to Townsend) that it was the state courts' failure to develop evidence crucial to Gates' claim which had denied him an opportunity to fully and fairly litigate the claim. Slip Opin. 1360.

The dissent (Slip Opin. 1361-1362) vigorously disagreed and would have affirmed the dismissal of the petition on the authority of Stone. The dissent believed the majority had ignored the obvious meaning of Stone and failed to accord deference to the public policy expressed in that decision.

New York's Statutory Scheme for Challenging the Admissibility of Evidence

In response to Mapp v. Ohio, 367 U.S. 643 (1961), the New York Legislature enacted a specific statutory scheme for the suppression of evidence obtained as a result of an unlawful search and seizure. N.Y. Code Crim. Proc. §§ 813-c through 813-e (Title II-B).* Section 813-c provides that a person who claims that evidence was obtained pursuant to an unlawful search and seizure may move for its suppression. The Court must hear evidence if an issue of fact is necessary to the motion's determination.

Section 813-d(1) states that the motion should be made prior to trial except that a motion "shall" be entertained during trial when the defendant was previously unaware of the seizure or did not obtain material evidence indicating unlawful acquisition until the trial or did not have adequate time or opportunity to make a pretrial motion. If the motion is made during trial, the evidentiary hearing (if one is necessary) is to be conducted outside the presence of the jury. § 813-d(3).

* Now codified as Article 710 of the N.Y. Crim. Proc. Law. Both the old and new laws provide also for challenges to the use of confessions and admissions.

If no motion is made in accordance with the statute, the defendant "shall be deemed to have waived any objection" to the admission of the evidence on the ground that it was unlawfully obtained. § 813-d(4) (now § 710.70[3] of the Crim. Proc. Law). One commentator has said of these waiver sections:

> "Since special elaborate machinery is constructed for the express purpose of according the defendant full opportunity to litigate these contentions, it hardly seems unfair to declare a waiver if he does not avail himself of that machinery." Denzer, Practice Commentary, 11 A McKinney's (Crim. Proc. Law), p. 306.

The importance of and legitimate interests served by state procedural requirements for challenging the admissibility of evidence have been duly noted. See, e.g., Henry v. Mississippi, 379 U.S. 443 (1965); People v. Gates, supra, 24 N Y 2d at 670; People v. Gates, supra, 61 Misc 2d at 251-252. And, while in rare cases New York has allowed a first time challenge to the voluntariness of a confession in the appellate courts (and then only on the ground that

a fundamental right, such as lack of counsel, is involved),* it has not created any exception for suppression of evidence claims. The claim must be raised at the trial level in order to preserve it for appeal.**

This Court applies the same rule barring suppression of evidence claims when there has been no suppression motion or objection at trial. E.g. United States v. Biano, 534 F. 2d 501, 507 (2d Cir. 1976); United States v. Lewis, 362 F. 2d 756, 759 (2d Cir. 1966).

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* People v. Arthur, 22 N Y 2d 325, 329, 292 N.Y.S. 2d 663, 666, 239 N.E. 2d 537, 539 (1968).

** People v. Chapple, 38 N Y 2d 112, 114 n.1; 378 N.Y.S. 2d 682, 685 n.*, 341 N.E. 2d 243, 245 n.* (1975); People v. Berrios (Byrant case), 28 N Y 2d 361, 367, 321 N.Y.S. 2d 884, 888, 270 N.E. 2d 709, 712 (1971); People v. Friola, 11 N Y 2d 157, 159, 227 N.Y.S. 2d 423, 424, 182 N.E. 2d 100, 101 (1962). Compare People v. DeBour, 40 N Y 2d 210, 214-215, 386 N.Y.S. 2d 375, 379, 352 N.E. 2d 562, 565-566 (1976).

POINT I

WHEN A PETITIONER CONCEDEDLY FAILED TO UTILIZE A REASONABLE STATE-PROVIDED PROCEDURE TO CHALLENGE EVIDENCE ON FOURTH AMENDMENT GROUNDS, STONE V. POWELL BARS A FEDERAL COURT FROM AWARDING HIM HABEAS CORPUS RELIEF REGARDLESS OF THE REASON FOR HIS FAILURE. ACCORDINGLY, NO EVIDENTIARY HEARING IS PERMITTED IN THIS CASE AND THE ORDER OF THE DISTRICT COURT DISMISSING THE PETITION SHOULD BE AFFIRMED.

A. Petitioner's objection to the admissibility of palmprint evidence was by his own admission not based on the Fourth Amendment.

One of the major difficulties with Gate's argument and the majority opinion on appeal is their assumption that the petitioner's catch-all constitutional objection at trial was intended to raise the Fourth Amentment issue (Gates) or was at least ambiguous as between Fourth and Fifth Amendment objections (the majority). The record conclusively demonstrates that they are both incorrect.

Gates' trial attorney was a named partner in the same firm which prepared his brief in the Appellate Division.* That brief (Brief "A") challenged the post-arrest (September 7) taking of fingerprints and palmprints on Sixth Amendment grounds, urging that he was entitled to the presence of counsel (Point IV, pp. 20-21). It challenged the October fingerprints on this Sixth Amendment basis and also on Fifth Amendment grounds, claiming that the taking was for evidentiary, not identification purposes. (Point V,pp. 21-28).** The brief did not raise a Fourth Amendment objection to the taking of any prints. No one would know better than Gates' own lawyer what was intended by his catch-all trial objection, and the Appellate Division brief answers

* That brief and all other state briefs on appeal are on file with the Clerk of this Court. See ante at 3 , n. * .

** We note that this latter portion of Gates' Appellate Division brief was written without one reference to Schmerber v. California, 384 U.S. 757 (1966), thus disposing of the majority's intimation that the catch-all objection was not likely to have been Fifth Amendment-based since Schmerber had already been decided.

that question conclusively.* Indeed, his brief is consistent with the way he made his objections at trial. Ante at 5-8.

Petitioner's Fourth Amendment claim was raised for the very first time in his brief in the New York Court of Appeals (Brief "C", pp. 19-21).** Gates had different counsel in that Court, and with the benefit of hindsight he was able to invent a new claim. Gates so admitted in that Court:

> "This Court may consider the question of the admissibility of the fingerprint identification evidence on the ground now urged although an objection was made at the trial only on Fifth and Sixth Amendment grounds." Brief "C" at p. 21 (emphasis supplied)

This concession was repeated in Gate's Court of Appeals brief (Brief "E" at pp. 9-10).

The above summary not only definitively answers the issue of what type of constitutional objection was made at

* All of this is quite consistent with the way the objection was warded and presented. If Gates had intended a Fourth Amendment claim he would not have objected to the "mere taking", and he would at least have demanded a hearing since the taking of evidence on probable cause was patently necessary. He made no such demand. On the Fifth and Sixth Amendment challenges, no further evidence was required since the facts relevant to those claims were conceded.

** The statement by the coram nobis court that that the contention was the first raised on oral argument in the Court of Appeals. (61 Misc. 2d at 252) is incorrect.

trial but also clears up the majority's puzzlement over the "failure" of the state courts to mention the catch-all objection in connection with their consideration of Gates' Fourth Amendment claim. There was no need to refer to it at all since it was undisputed that it bore no relevance to the Fourth Amendment argument urged on appeal and coram nobis.

B. Stone v. Powell precludes habeas relief when an applicant fails to avail himself of a state-provided opportunity to litigate his claim.

In Stone v. Powell ("Stone"), _____U.S._____, 96 S. Ct. 3037 (1976), the Supreme Court held that federal habeas corpus relief may not be awarded to a state prisoner when the state has provided an opportunity for full and fair litigation of the Fourth Amendment claim. The Court repeated the work "opportunity" whenever it used the words "full and fair litigation". Not once did it intimate the applicant must actually have had such ltigation, rather than an opportunity for it.

In this case, as we have just demonstrated, Gates made no pretrial or trial motion to suppress his palmprints on Fourth Amendment grounds, as was required by Code Crim. Proc. §813-d. Gates has never claimed that New York's statutory procedure would not have provided him with a full and fair opportunity to litigate the probable cause issue, nor could he (see discussion of the statutory scheme, ante at pp. 13-15) Nor has he ever suggested that he has any reason, let alone an excusable one, for his total failure to abide by New York's legitimate procedural requirements. And he has never questioned the competency of his counsel. See O'Berry v. Wainwright, 546 F. 2d 1204, 1218 (5th Cir. 1977), pet. for cert. filed, April 7, 1977.

We are, therefore, confronted with a "pure" situation: a habeas applicant who did not use the state-provided mechanism to litigate his Fourth Amendment claim and who does not claim that he lacked the opportunity to do so.

As the dissent readily found, the Stone decision by its own terms bars relief to such an applicant. Stone rejected the view that effectuation

of the Fourth Amendment requires the granting of federal habeas relief when a prisoner has been convicted in a state court on the basis of illegally seized evidence. 96 S. Ct. at 3045. The exclusionary rule is not a constitutional right but a "judicially created means of effectuating the rights secured by the Fourth Amendment." Id. at 3046. After reviewing the costs and justifications for the exclusionary rule, the Court concluded that its primary justification, deterrence, was too minimal a concern in a federal collateral proceeding to support its application by a federal habeas court. Id. at 3046-3052. While the costs of applying the rule (including diversion from the question of guilt and innocence and the exclusion of typically reliable evidence) are great, the Court found (at the most) only marginally additional deterrent force in the possibility that a search or seizure might be declared invalid in a federal collateral proceeding. Id. at 3051-3052. This additional contribution, if any, is outweighted by the detrimental ramifications to the criminal justice system. Id. The Court thus decided that no habeas relief should be granted to a state applicant who has been provided with an opportunity for full and fair litigation of a Fourth Amendment claim. Id at 3052.

The opinion excludes those state applicants who actually litigated their Fourth Amendment claims and those who had the opportunity to do so but did not avail themselves of it. With regard to the former category there is the additional policy of according due respect to state court judges who are obligated to apply federal law. The absence of this rationale for the second category by no means excludes them from the Stone decision; otherwise the work "opportunity" would be meaningless, an assumption we cannot make of a Supreme Court holding.

The applicability of Stone to petitioner's situation is not governed by the Supreme Court's "cf." footnote to Townsend v. Sain ("Townsend"), 372 U.S. 293 (1963) (96 S. Ct. at 3052 n. 36). Petitioner adopts the majority's conclusion that Townsend imparts into Stone a requirement that a hearing must actually have been held unless the petitioner "deliberately bypassed" the appropriate state procedure within the meaning of Fay v. Noia ("Fay"), 372 U.S. 391 (1963).

While the Supreme Court's "cf." reference to Townsend might possibly suggest that some of the Townsend categories are useful in determining if a state applicant who actually had a hearing had "full and fair litigation" of his claim, it bears not on the petitioner who failed to avail himself of the orderly state procedure.* First, the Stone opinion nowhere suggests that relief should be denied only to the applicant who had the opportunity to litigate his Fourth Amendment claim but deliberately chose not to use it. Rather, Stone simply holds that if the opportunity was available, relief cannot be granted.**

Second, respondent's argument is entirely consistent with the primary rationale of Stone, i.e., that the exclusionary rule serves little purpose at the federal collateral level. This rational remains exactly the same

* The dissent in O'Berry agreed that the reference to Townsend did not relate to those who forfeited their opportunity. 546 F. 2d at 1219-1220 n.1.

** In Juidice v. Vail, ____U.S.____, 45 U.S.L.W. 4269, 4272 (March 22, 1977), the Supreme Court stated that judgment debtors' failure to avail themselves of a state-provided opportunity to raise their federal claims did not mean that the state procedures were inadequate.

regardless of the reason for a petitioner's failure to use the state-provided opportunity to litigate his claim. The application of the exclusionary rule is of minimal deterent value whether a petitioner actually litigated his claim or had the opportunity but deliberately chose not to avail himself of it or had the opportunity but inadvertently failed to use it. As the dissent noted, the majority fails to accord deference to Stone's policy rationale. Slip Opin. at 1362.

Third, to import the Fay deliberate bypass test into each habeas proceeding in which the petitioner has not had his Fourth Amendment claim litigated in state courts would clearly create additional litigation for the federal courts. In this Circuit, for example, there will be endless discussion of the possible strategic reasons for the bypass (e.g. majority opinion, Slip Opin. at 1357-1358; Kibbe v. Henderson, 534 F. 2d 493, 496-497 [2d Cir. 1976], sub judice on other grounds in the Supreme Court, 75 - 1906). Additionally, Fay by its own language may require an evidentiary hearing solely on the bypass issue. 372 U.S. at 439. It is clear that the Stone Court was concerned with the increasing volume of habeas applications (see 96 S. Ct. at 3050 n. 31), and its entire thrust was to exclude an entire category of those applications from federal review. To graft the Fay test onto all petitions in which the applicant failed to use his state remedies conflicts with the Court's efforts toward judicial economy. It is much more likely

intended that once a determination is made that a state provided for full and fair Fourth Amendment litigation, habeas relief must be denied to any petitioner who forewent his opportunity.*

Respondent's position is supported by the decision of the Fifth Circuit in O'Berry v. Wainwright, supra, 546 F. 2d 1204. In O'Berry the habeas applicant failed to challenge before or at trial police testimony as to a car which he later claimed was illegally seized and searched.** He did not appeal his conviction and like petitioner herein, never challenged the effectiveness of counsel. After a state habeas decision that his right to a direct appeal had been frustrated by state action, O'Berry was allowed his direct appeal and fully presented his Fourth Amendment claim.*** The Florida Court refused to hear his claims because of his failure to raise them at trial.

* There will be those rare occasions when a petitioner claims "no opportunity" because his state does not allow litigation of his claim. E.g. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976) (State law did not allow subject of a search to challenge evidence as illegal on the ground that the warrant was procured by police perjury). See also Kahn v. Flood, ___F.2d ____, (2d Cir. February 22, 1977)(Slip Opin. 1919). Also, the Supreme Court has granted certiorari in a case (Browder v. Director, Dept. of Corrections, 76-5325, 45 U.S.L.W. 3508 [January 17, 1977]) which raises the question of whether incompetency of appointed defense counsel deprived a petitioner of an opportunity to raise Fourth Amendment claims in the state courts. 45 U.S. L.W. 3524.

**There was no evidence as to whether the failure to object was inadvertent or deliberate. 546 F. 2d at 1215.

***No hearing on the claim was necessary because the facts were undisputed. 546 F. 2d at 1213.

The Fifth Circuit held that Stone barred the award of habeas relief:

> "We conclude, for several reasons, that the Stone 'opportunity for full and fair consideration' requirement is satisfied where the state court is squarely faced with Petitioner's Fourth Amendment claim, but chooses to resolve that claim on an independent, adequate, non-federal state ground [i.e. the failure to object at trial], at least where the state ground does not unduly burden federal rights. 546 F. 2d at 1216-1217 (footnotes omitted).

The Court found, inter alia, that this conclusion was consistent with Stone's use of the word "opportunity" and was consistent also with Stone's cost-benefit analysis of the exclusionary rule. 546 F. 2d at 1212. The Court further stated that allowing the state court to resolve the issues on an adequate state ground furthers the Stone conviction that state courts are as competent as federal ones to ensure protection of Fourth Amendment rights. Id. While the O'Berry petitioner presented undisputed facts to support his claim, the holding is equally applicable to the case at bar.

C. The New York Courts cannot be criticized for failure to inquire into a criminal defendant's catch-all objection to evidence when the objection lacks sufficient specificity to apprise anyone of the ground being urged.

Since we have shown petitioner's trial objection to have excluded Fourth Amendment grounds, this case does not involve an ambiguous constitutional objection as the majority believed to be the case. However, both petitioner and the majority contended that since Gates did not deliberately bypass New York's suppression scheme, it was the State which denied him the opportunity to litigate his Fourth Amendment claim because the courts did not pursue his general objection.

Although these contentions are no longer viable (since they rest on the now proved to be erroneous assumption that Gates' catch-all trial objection might have had Fourth Amendment implications), respondent takes strong issue with criticism of the New York courts (e.g. Slip Opin. 1354-1355, 1360) for failing to inquiry into an objection which was, in Gates' attorney's language:

> "to the introduction of those prints on the basis that this man's constitutional rights both

> under the State and Federal Constitution have been violated by the taking of these prints and as such we object to them." (ROA 369)

This Court itself has refused on direct criminal appeals to hear an objection to evidence on a ground that was not urged below, because the defendant:

> "failed reasonably to apprise the trial judge of the grounds asserted here. The notice of motion was broadly worded and encompassed so many possible errors in the pretrial proceedings that it failed to particularize any one specific ground." U.S. v. Indiviglio, 352 F. 2d 276, 279 (2d Cir. 1965), cert. den. 383 U.S. 907 (1966).

In Indiviglio this was the holding despite the fact that the District Judge was aware of the ground not presented to him but later urged on appeal. 352 F. 2d at 278. This Court did not suggest that the federal trial judge should have pursued this claim sua sponte. See also United States v. Klein, 488 F. 2d 481, 482-483 (2d Cir. 1973), cert. den. 419 U.S. 1091 (1974).

The pressing policy reasons for specific objections to evidence have been well-noted. E.g. On Lee v. United States, 343 U.S. 747, 749-750 n. 3 (1952); United States v. Indiviglio, supra, 352 F. 2d at 279-280. See also Chambers v. Mississippi, 410, U.S. 284, 308-314 (1973) (Rehniquist, J., dissenting). Moreover, instant case is a habeas corpus proceeding concerned with fundamental fairness. E.g. Donnelly v. DeChristoforo, 416 U.S. 637, 642-643 (1974); Lisenba v. California, 314 U.S. 219, 236 (1941). The state courts cannot be held to a stricter standard than that imposed on the federal courts. See Henderson v. Morgan, 426 U.S. 637, 653 (1976) (Rehnquist, J., dissenting) (no more stringent a standard can be applied as a matter of constitutional law on federal habeas review of state convictions than to federal convictions). Moreover, the criticism of the state courts ignores the respective roles of trial counsel and the trial judge in our adversary system. See, e.g., Estelle v. Williams, 425 U.S. 501, 512 (1976).

If a state petitioner does not avail himself of a state-provided opportunity to litigate his Fourth Amendment claim, deliberately or inadvertently, Stone bars the award

of relief. A petitioner who makes a general objection to evidence on "constitutional" grounds, without more, can hardly be exempted from Stone on the theory that the state deprived him of an opportunity to litigate. It is the petitioner himself who deprived everyone of the opportunity to hear his Fourth Amendment claim.

D. Reasons of policy and equity support respondent's position.

As respondent has argued, Stone's policy conclusion that the costs of collateral application of the exclusionary rule outweigh the benefits of minimal deterrrence is unaffected by the reason for a petitioner's failure to available himself of the state-provided opportunity (ante at 23-24). The exclusionary rule is a judicially created means of effectuating Fourth Amendment rights (Stone, 96 S. Ct. at 3046); there is no constitutional right to exclusion. Because of minimal deterrent value when the rule is applied at the federal habeas level, the Supreme Court decided to exclude from review those cases in which applicants had an opportunity for full and fair state court litigation.

In accordance with this policy determination and to avoid additional piecemeal litigation of Fay deliberate bypass claims (ante at 24), it is perfectly reasonable that Stone's stricture apply to all those who fail to use the states's procedure, whether by choice or accident. See O'Berry, 546 F. 2d at 1216-1218.

Apparently, neither petitioner, the majority, nor the O'Berry dissent believe that the Stone decision could have decided to omit the Fay deliberate bypass test from this Fourth Amendment area without specifically so holding. Actually, the same Court has twice in the last year held that the simple failure to object or move at an appropriate time is sufficient to bar relief to a state habeas applicant, regardless of the reasons for the failure. Estelle v. Williams, supra, 425 U.S. 501; Francis v. Henderson, 425 U.S. 536 (1976). In neither case did the Court state that it was modifying or abandoning the Fay deliberate bypass test. Accordingly, the absence of a Fay discussion in the Stone opinion is not controlling.

Respondent does not urge that the deliberate bypass test has been generally abandoned or modified. We do urge that common sense and policy considerations support the argument that the Stone bar applies to all state applicants

who fail to use a state-provided opportunity to litigate their claims, regardless of the reason for the failure.

POINT II

ASSUMING ARGUENDO THAT HABEAS RELIEF IS NOT BARRED BY STONE V. POWELL, THE PETITION SHOULD BE DISMISSED BECAUSE THE INTRODUCTION OF THE PALMPRINT WAS HARMLESS ERROR WHEN UNCHALLENGED FINGERPRINT EVIDENCE PLACED GATES AT THE SAME ENTRY POINT TO THE MURDER VICTIM"S APARTMENT.

In this proceeding, Gates challenges the admission of his palmprint testimony only. He does not argue that his fingerprint testimony was inadmissible on the Fourth Amendment ground. The reason for this is apparent. The discovery of his fingerprints was inevitable. See, e.g., People v. Fitzpatrick, 32 N Y 2d 499, 506-508, 346 N.Y.S. 2d 793, 796-798, 300 N.E. 2d 139, 141-142, cert. den. 414 U.S. 1033 (1973). See United States ex rel. Roberts v. Ternullo, 407 F. Supp. 1172 (S.D.N.Y. 1976). The prints could easily have been removed from any object Gates touched in a public place. More significantly, Gates had a 1964 felony arrest in Rockland County and his prints were on file with the New York State Division of Identification (now the Division of Criminal Justice).

The evidence against Gates is summarized above (ante at 4-5 ; see also Gates' Appellate Division and Court of Appeals briefs). The palmprint Gates seeks to exclude had no more significance than the unchallenged fingerprint. Indeed, if anything, the fingerprint was of more value.

Both the doors and windows to the Patricia Gates apartment were found locked or closed with the exception of the bathroom window, which was found open. The screen to that window had been removed and was leaning against the house. Gates' palmprint was found on the window sill facing inward. His fingerprints were found on a wood section of the screen and were positioned so that they could only have been made by someone removing the screen from the outside. The fingerprints were more damaging since Gates (who visited the house regularly) could have argued that he had leaned against the windowsill (perhaps to see inside) with less cause for suspicion than he could have argued that he had a reason for removing the screen.

In light of the other evidence offered, the introduction of the palmprint, which was merely cumulative to the fingerprints, was harmless beyon a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

THE ORDER OF THE DISTRICT COURT DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
April 11, 1977

Respectfully submitted,

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